Supreme Court, U.S.
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No. 96-727

In the
Supreme Court of the United States
October Term, 1996

ARNOLD HOLMBERG,

Petitioner,

v.

CITY OF RAMSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's predecessor in interest owned and operated an adult business named the Amusement Center, Inc. The business opened in 1990 and consisted of the sale of sexually-explicit books, magazines, novelties and the on-premises viewing of adult movies. Appendix, at 92 (subsequently referred to as "A-_"). After the business opened, Respondent City of Ramsey ("City") adopted a comprehensive set of regulations regulating adult businesses.

Under the ordinance, adult uses were classified as either "adult uses-principal" or "adult uses-accessory." An adult-use principal is one that has more than 10% of its stock in trade or floor area allocated to, or more than 20% of its gross receipts derived from, any adult use. (A-47) An adult-use accessory is one that has 10% or less of its stock in trade or floor area allocated to, or 20% or less of its gross receipts derived from, an adult use. (A-47) The ordinance provided that adult uses-principal must be located at least 1000 feet from certain protected uses, including residential zones, daycare centers, schools, on-sale liquor establishments, and churches. (A-99) Petitioner's business violated the ordinance because it was an adult-use principal and was located within 1000 feet of residentially zoned property, a daycare center, a church, and an on-sale liquor establishment. (A-100)

Petitioner unsuccessfully challenged the constitutionality of the City's ordinance in a federal court action. Schneider v. City of Ramsey, 800 F.Supp. 815 (D.Minn. 1992), aff'd sub nom. Holmberg v. City of Ramsey, 12 F.3rd 140 (8th Cir. 1993), cert denied, 115 S.Ct. 59 (1994) ("federal lawsuit"). After the federal lawsuit was completed, the City brought an action in state court seeking declaratory and injunctive relief to prevent Petitioner from operating the business in violation of the ordinance. In opposing the City's request, Petitioner contended that the nature of the business had changed so that the federal lawsuit was no longer applicable. Specifically, Petitioner contended that he changed the business by eliminating the on-premises viewing of sexually-explicit

material and by adding non-adult materials so that only 25% of the stock in trade and floor area were devoted to sexually-oriented materials. (A-4) Petitioner contended that because the nature and operation of the business has changed, the federal litigation was no longer binding on the "new" business even though the "new" business still constituted an adult-use principal. (A-4)

The Minnesota Court of Appeals affirmed the trial court's decision granting summary judgment in favor of the City. In doing so, the court of appeals concluded that the ordinance was a content-neutral time place and manner regulation, that the studies relied upon by the City were reasonably related to the type of business that Petitioner was conducting and that there was no requirement that the City conduct any new studies. (A-7 to A-9) The Minnesota Supreme Court denied review. (A-1)

ARGUMENT

THE MINNESOTA COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Petitioner contends that certiorari should be granted because the state court decision conflicts with "the highest courts of other jurisdictions ... and this court's holdings." (Petition, p.13) The "decision" by the Supreme Court was a decision to deny review. The only substantive decision by an appellate court in this case is the court of appeals decision. The Minnesota Court of Appeals is not a court of last resort. Consequently, whether or not the decision conflicts with the highest courts of other jurisdictions is not a basis for granting certiorari. Sup. Ct. R. 10(b). The applicable standard in this case is whether the court of appeals decision has decided an important federal question in a way that conflicts with relevant

decisions of this Court. Sup. Ct. R. 10(c). Petitioner has not demonstrated that this standard is met in this case.

The Supreme Court has established a three-part test to determine whether a statute or ordinance regulating adult businesses is constitutional. A court must determine: (1) whether the statute or ordinance is a content-neutral time, place, and manner restriction; (2) whether the government has a substantial interest in regulating adult businesses which is unrelated to the suppression of free speech; and (3) whether the ordinance allows a reasonable opportunity for adult businesses to locate in the city. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S. Ct. 925 (1986). The first and third prong of this test were indisputably decided in the City's favor in the federal lawsuit and are not an issue in this petition. Petitioner contends that the ordinance does not meet the second prong of the Renton test because the ordinance is overbroad. (Petition, p.13)

In Renton, this Court held that a city may establish its substantial interest by compiling a record with evidence that may be reasonably believed to be relevant to the problem that the city desires to address. Renton, 475 U.S. at 51-52. A city's justifications are not necessarily conclusory and speculative because the city's opinion is based upon studies of other communities. Id. at 50. A city "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976). Petitioner contends that the ordinance is "overbroad" because it is not limited to a category of land uses, i.e., adult businesses with off-premises consumption only, that have been shown to cause adverse secondary effects. That, however, is the exact issue that a court must address in determining whether an ordinance regulating adult businesses is designed to serve a substantial governmental interest. The court of appeals rejected Petitioner's claim and in doing so, expressly relied upon Renton. (A-7) Far from deciding a question that conflicts with applicable Supreme Court decisions, the court of appeals expressly followed Supreme Court decisions.

In addition, the Court of Appeals expressly relied upon the Eighth Circuit interpretation of Renton as set forth in ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994), cert. denied, 115 S.Ct. 578 (1994). The Court of Appeals decision is consistent with both Renton and ILQ.

The cases relied upon by Petitioner do not support a conclusion that the court of appeals decision conflicts with Renton. Two of the cases relied upon by Petitioner, Pringle v. City of Covina, 155 Cal.App.3d 151, 171 Cal.Rptr.251 (1981) and Tollis v. San Bernadino County, 827 F.2d 1329 (9th Cir. 1987), are both cases where a city attempted to apply its adult entertainment ordinance to a single showing of a sexually explicit motion picture. Those cases clearly are not on point.

Petitioner's reliance on Z. J. Gifts v. City of Aurora, 932 F.Supp. 1256 (D. Colo. 1996) is also misplaced, because that decision misapplied the Renton test and is inconsistent with virtually all other federal appellate court decisions. The court in Z. J. Gifts concluded that the Eighth Circuit's rationale in ILQ was "flawed" because it was directed more toward the subjective intent of the city council than the objective effects on the freedom to communicate. Id. at 1258. What the court overlooked, however, is that in a constitutional sense, it is not necessary for a court to scrutinize the studies relied upon by a local government to determine whether they address the precise nature of the activities occurring in the adult establishment. Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986). Judicial review of the city's decision "goes only to whether the legislative determination of justification and fitness is not facially without factual support, hence not arbitrary and capricious." Id.

Similarly the recent United States Supreme Court decision in 44 Liquor Mart, Inc. v. Rhode Island, ____ U.S. _____, 116 S.Ct. 1495 (1996) is of no help to Petitioner. In that case, the purpose of the state law was to prohibit the advertisement of retail liquor prices except at the place of sale. This Court held that a state does not have the authority to suppress truthful, non-misleading information. In this case, the City has regulated, not prohibited, adult establishments, and this Court

has concluded in Renton that the City has the authority to regulate adult businesses that are protected by the First Amendment.

Petitioner also goes to great length to try to demonstrate that the record before the court of appeals in this case is different than the record before the court in ILQ. The City strongly disagrees with that statement, but in any event that argument is insufficient for this Court to grant the extraordinary relief requested by Petitioner. At best, Petitioner's complaint is that the state court made erroneous factual findings or misapplied the rules set forth in Renton. Neither one of those factors justify review by this Court. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

CONCLUSION

Petitioner has not demonstrated a compelling reason for this Court to grant review. The City respectfully requests that the petition is denied.

Respectfully submitted this 9th day of December, 1996.

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